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No. 02-136

In the Supreme Court of the United States

PIN YEN YANG, FOUR PILLARS ENTERPRISE CO., LTD., AND HWEI-CHEN YANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the government must prove that the defendants conspired to steal actual trade secrets under the Economic Espionage Act of 1996, 18 U.S.C. 1832(a)(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 281 F.3d 534.

JURISDICTION

The judgement of the court of appeals was entered on February 20, 2002. A petition for rehearing was denied on April 10, 2002. On July 8, 2002, Justice Stevens extended the time within which to file a petition for writ of certiorari to and including August 7, 2002, and the petition was filed on July 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiring to steal a trade secret and attempting to receive a trade secret, in violation of 18 U.S.C. 1832(a)(5) and (4) (counts 20 and 21). At sentencing, the district court granted downward departures to petitioner Pin Yen Yang (Yang) and petitioner Hwei-Chen Yang (Sally Yang), and imposed an upward departure on petitioner Four Pillars Enterprise Co., Inc. (Four Pillars). The court sentenced Yang to two years' probation, six months of home confinement in lieu of imprisonment, and a $250,000 fine. Sally Yang was sentenced to one year's probation and a $5000 fine. Four Pillars was ordered to pay a fine of $5 million. Pet. App. 34a-49a. The court of appeals affirmed the convictions but reversed the sentences on the ground that the district court had abused its discretion in granting Yang and Sally Yang the downward departures and had failed adequately to explain the upward departure imposed on Four Pillars. The court therefore remanded for resentencing. Pet. App. 25a.

1. Four Pillars, a Taiwanese company, manufactured and marketed pressure-sensitive tapes. Yang owned Four Pillars, and petitioner Sally Yang, his daughter, was a scientist and supervisor at the company. Avery Dennison Inc., an American company, competed with Four Pillars in the manufacture of adhesive tapes and labels. Pet. App. 4a; Gov't C.A. Br. 1.

Dr. Victor Lee was a scientist involved in researching adhesives at Avery. During an eight-year period, Lee illegally disclosed confidential information to Four Pillars' executives and scientists. The scheme began in 1989, when Lee made a presentation at Four Pillars and

met with Yang and Sally Yang. Yang and Lee met privately, and Yang told Lee that he wished to strengthen Four Pillars' label business and that Lee could teach them what he knew. For his services as a "consultant," Yang offered Lee $25,000 per year. The parties agreed that the relationship would remain secret. Pet. App. 4a; Gov't C.A. Br. 1-3.

For the next several years, Lee provided confidential information, including formulas for adhesives and reports about rheology (the study of adhesives), to petitioners. In addition, Lee used Avery machines to test Four Pillars' adhesives and provided reports comparing those products to Avery products. Pet. App. 4a.

In 1997, agents with the Federal Bureau of Investigation suspected that Lee was providing confidential information to petitioners and confronted him with their suspicions. Lee agreed to cooperate and taped several telephone conversations with Yang and Sally Yang. During those conversations, including at least one initiated by Yang, petitioners continued to ask for Lee's help in solving Four Pillars' production problems. Pet. App. 4a; Gov't C.A. Br. 5; C.A. App. 1933.

During one of the telephone conversations, Yang told Lee that he would be visiting the United States during the summer of 1997, and Lee told him that he had information about a new emulsion coating that he would provide Yang during his visit. Lee also asked Yang whether he was interested in information on Avery's plans in the Far East, and Yang stated that he was. Pet. App. 5a.

On September 4, 1997, Lee met with Yang and Sally Yang in a hotel room, and FBI agents videotaped the meeting. Lee brought several documents to the meeting, including a document labeled as a patent application with a "confidential" stamp on it. During the meet-

ing, Lee gave the materials to Yang, emphasizing that the patent application was a confidential Avery document relating to a new adhesive product. Yang pointed to the "confidential" stamp on the document and instructed Sally Yang to cut that stamp off. The three also discussed the "treasure box" of materials that Lee had provided petitioners over the years. Following the meeting, Yang and Sally Yang were arrested. Yang had in his suitcase the patent application and other Avery documents that he had obtained from Lee, with the "confidential" markings removed. Pet. App. 5a; Gov't C.A. Br. 6-7.

2. Petitioners were charged in a 21-count indictment with 13 counts of mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343; three counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); one count of conspiring to launder money, in violation of 18 U.S.C. 1956(h); three counts of possession of stolen goods, in violation of 18 U.S.C. 2315; one count of conspiring to steal a trade secret, in violation of 18 U.S.C. 1832 (a)(5); and one count of attempting to steal a trade secret, in violation of 18 U.S.C. 1832(a)(4). C.A. App. 73-99. The two trade secret counts specified that the trade secret was a "confidential and proprietary patent application for a new emulsion adhesive, owned by Avery," *id.* at 97, 99, and the conspiracy count charged the time period "from on or about August 31, 1997," *id.* at 97.[1]

The court granted the government's motion to dismiss several of the mail and wire fraud counts and a money laundering count before the close of the government's case. The court later granted judgments of

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[1] The Economic Espionage Act of 1996, which included the trade secret provisions at issue here, was enacted in October 1996. Pub. L. No. 104-294, Tit. I, § 101(a), 110 Stat. 3489.

acquittal on all but one mail fraud count and the counts charging petitioners with attempting and conspiring to steal a trade secret. The jury acquitted petitioners on the mail fraud count, but found them guilty on the two remaining counts. Pet. App. 2a.

3. On appeal, petitioners contended, *inter alia*, that the patent application used in the sting operation was not a trade secret because it contained information made public in 1999, and that petitioners therefore did not conspire or attempt to steal an actual trade secret. Yang C.A. Br. 29-36. They similarly argued that the court's instructions to the jury were in error because they did not require the government to prove that petitioners stole an actual trade secret. *Id.* at 46-48.

The court of appeals affirmed the convictions. Finding "persuasive the logic and reasoning" (Pet. App. 9a) of the Third Circuit in *United States* v. *Hsu*, 155 F.3d 189 (1998), the court of appeals followed that court in holding that impossibility is not a defense to conspiring to steal trade secrets. The court noted that it, like the Third Circuit, has definitively held in analogous circumstances that impossibility is not a defense when the government uses a sham controlled substance, rather than the actual drugs, in a drug sting. Pet. App. 7a-9a. It also relied on the fact that Congress intended the Economic Espionage Act of 1996 to provide a comprehensive approach to the problem of theft of trade secrets, and that requiring the government to use actual trade secrets in its sting operations would defeat that purpose. *Id.* at 10a ("In effect, the [petitioners'] position would, as the Third Circuit pointed out, force the government to disclose trade secrets to the very persons suspected of trying to steal them, thus gutting enforcement efforts under the EEA.") (internal quotation marks and citation omitted)). Because peti-

tioners intended to steal actual trade secrets, and they committed an overt act towards the completion of the crime, they conspired and attempted to steal trade secrets. *Id.* at 10a-11a.[2]

DISCUSSION

Petitioners contend (Pet. 6-9) that this Court should grant review on the question whether the defense of impossibility applies to attempt and conspiracy provisions of the Economic Espionage Act of 1996, 18 U.S.C. 1832(a)(4) and (5), where the government has not proved that the trade secrets that were ultimately delivered to the defendants were actual trade secrets.

1. In *United States* v. *Recio*, No. 01-1184, this Court granted certiorari to consider "[w]hether a conspiracy ends as a matter of law when the government frustrates its objective." 01-1184 Pet. at i. In that case, two individuals driving a truckload of marijuana and cocaine had been arrested by law enforcement authorities and the drugs seized. One of the drivers agreed to cooperate with the police and contacted other members of the conspiracy to have someone sent to pick up the truck at a shopping mall. Law enforcement officers transported the truck to the mall, and defendants were arrested when they picked up the truck. *United States* v. *Recio*, 258 F.3d 1069, 1070-1071 (9th Cir. 2001).

The two defendants in *Recio* were found guilty of conspiracy to possess the drugs with intent to distribute them, in violation of 21 U.S.C. 846. Relying on its prior decision in *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998), the

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[2] The court of appeals rejected a variety of other claims made by petitioners. Pet. App. 11a n.2, 17a-25a. The petition for certiorari does not challenge the court of appeals' rulings on any of those claims or on the sentencing issues.

court of appeals reversed defendants' convictions. The court held that the original seizure of the drugs had necessarily terminated the conspiracy by frustrating its objectives. The court held that, because the conspiracy had therefore terminated before the proof showed that the defendants had joined it, they could not be convicted of participation in that conspiracy. 258 F.3d at 1071-1073.

2. This case does not involve precisely the same question presented in *Recio*. Law enforcement authorities did not take action to frustrate an ongoing conspiracy in this case, and the question whether such frustration necessarily terminates a conspiracy even if the defendants are unaware of it accordingly is not presented here.

Nonetheless, it would be appropriate to hold this case pending this Court's disposition of *Recio*. Petitioners argue that the goal of their conspiracy was impossible to achieve, because, although they tried to steal what they thought were trade secrets, it turned out that they were not in fact trade secrets. See Pet. i ("The question presented is whether petitioners' belief that they were receiving an actual trade secret is a sufficient basis for their conviction."). They thus argue that impossibility is a defense to their conspiracy charge. This Court's resolution in *Recio* of the question whether impossibility necessarily terminates a conspiracy could affect the analysis of that question. Furthermore, although petitioners were convicted of attempt as well as conspiracy, it is possible that the Court's resolution of the question presented in *Recio* could have a bearing on the analysis of petitioners' argument that impossibility is a defense to their attempt offense as well.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Recio*, No. 01-1184, and then disposed of accordingly.

Respectfully submitted.

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